

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DELPHINE ALLEN, et al.,

Plaintiffs,

v.

CITY OF OAKLAND, et al.,

Defendants.

Case No. 00-cv-04599-TEH

**ORDER RE: INVESTIGATOR'S
REPORT ON ARBITRATIONS**

On August 14, 2014, this Court ordered the Compliance Director to investigate issues relating to the manner in which the Oakland Police Department ("OPD") and the City of Oakland prepare discipline cases for arbitration. The Court subsequently appointed a Court Investigator to assist the Compliance Director with this investigation, and the Investigator filed his report on April 16, 2015.

The Court's order emanated from high-profile reversals at arbitration of the City's decisions to terminate two OPD officers. First, the City terminated the employment of Hector Jimenez after he shot and killed an unarmed civilian in July 2008. An arbitrator overturned that termination in 2011. Second, the City terminated the employment of Robert Roche after he threw a tear-gas grenade into a crowd of civilians attending to an injured Occupy Oakland protester in October 2011. An arbitrator overturned that termination last year. Although these are not the only two cases the City has lost at arbitration – in fact, the Investigator notes that the City's recommended discipline was modified or reversed in nine straight arbitrations prior to the Court's August 14, 2014 order, Report at 11 – they are the most high-profile ones in recent memory.

These incidents also go to the very heart of this case, filed fifteen years ago. As the January 2003 Negotiated Settlement Agreement ("NSA") makes clear, the goal in this litigation has always been to protect the public against police misconduct – including the

1 racial bias, excessive force, planting of evidence, and falsifying of reports alleged by
 2 Plaintiffs – and to ensure accountability whenever misconduct occurs:

3 The parties join in entering into this Settlement Agreement . . .
 4 to promote police integrity and prevent conduct that deprives
 5 persons of the rights, privileges and immunities secured or
 6 protected by the Constitution or laws of the United States. The
 7 overall objective of this document is to provide for the
 8 expeditious implementation . . . of the best available practices
 9 and procedures for police management in the areas of
 10 supervision, training and accountability mechanisms, and to
 11 enhance the ability of the Oakland Police Department . . . to
 12 protect the lives, rights, dignity and property of the community
 13 it serves.

14 NSA at 1. Notably, the City is a named party in this case and a signatory to the NSA; thus,
 15 while the OPD is the primary focus of the NSA’s reforms, the City as a whole bears
 16 ultimate responsibility.

17 As the Court explained when it ordered an investigation, there is no doubt that
 18 “there may be room for differences of opinion [in some discipline cases], and that not
 19 every disciplinary decision will be upheld at arbitration.” Aug. 14, 2014 Order re: Internal
 20 Affairs Investigations & Subsequent Proceedings at 2. Nonetheless, given the City’s track
 21 record, the Court “question[ed] whether Defendants are adequately preparing cases for
 22 arbitration such that consistency of discipline can be assured to the greatest extent
 23 possible.” *Id.* As the Court also explained, “imposition of discipline is meaningless if it is
 24 not final. . . . Just like any failure to impose appropriate discipline by the Chief or City
 25 Administrator, any reversal of appropriate discipline at arbitration undermines the very
 26 objectives of the NSA.” *Id.* at 1.

27 The Court Investigator’s findings are both disappointing and shocking. After
 28 reviewing the report, it is difficult to reach any conclusion other than that the City has been
 indifferent, at best, to whether its disciplinary decisions are upheld at arbitration. Many of
 the Investigator’s recommendations are obvious, or at least would be to anyone concerned
 with trying to improve the City’s arbitration success rate. One might think that paying
 millions of dollars to settle civil lawsuits, and hundreds of thousands more in back pay and
 attorneys’ fees to reinstated officers whose actions gave rise to those lawsuits, would give

1 pause to the City's leaders, or that the failure to preserve the City's disciplinary decisions
2 would spur the Chief of Police, City Administrator, Mayor, City Attorney, and/or City
3 Council to action. Yet this issue appears to have gotten little attention until this Court's
4 August 14, 2014 order.

5 Some of the most problematic incidents in the Investigator's report occurred after
6 the Court expressed concerns about the Jimenez case in 2011, at which time the City
7 promised to give more attention to the issue and work to correct deficiencies. Those
8 promises, if not empty, have certainly fallen short. Indeed, it does not appear that the City
9 made any significant changes to the way it handled arbitration cases until after this Court
10 ordered an investigation – or, if it did, the changes were utterly ineffective. Moreover,
11 although the Investigator notes “significant and commendable improvements” since the
12 Court's August 2014 order, he also presents many recommendations, some seemingly the
13 most basic and all of which were made by City and Department employees, that the City
14 has failed to implement. Report at 39. As the Investigator concludes, “The City
15 understands what it needs to do to make police discipline work, but it has not previously
16 demonstrated the will to do it.” *Id.* at 40. It is problematic that the City required a court
17 order to make any meaningful changes at all, and equally so that it failed to implement all
18 of the necessary ones even after doing its own internal investigation.

19 Perhaps the City's attitude is one of “we did the best we can.” But if the best the
20 City can do is to select outside counsel for reasons other than subject-matter expertise and
21 provide them with inadequate time to prepare a case for arbitration, to have a broken
22 relationship between the Department and the City Attorney's Office, and to have no
23 feedback loop for improvement after arbitration wins and losses, that is clearly insufficient.
24 A poor arbitration success rate has repercussions for the Department's leadership, who
25 might wonder why its decisions, which are approved by the City Administrator in most
26 cases, are not upheld, as well as for the rank and file, who might perceive the discipline
27 system to be a farce because officers have a high likelihood of overturning or significantly
28 reducing discipline at arbitration. The City's shortcomings also have a significant impact

1 on the public, which can have no confidence that the discipline system works if discipline
2 is regularly overturned at arbitration. More fundamentally, reinstating officers whom the
3 City has determined should be terminated for unjustified uses of force – including, as in
4 the Jimenez case, a fatal shooting – creates very serious public safety risks.

5 While the City has made much progress in the years following their agreement to
6 the NSA reforms, the Court Investigator’s report demonstrates that much more progress
7 remains to be achieved – perhaps, most notably, the need for leaders at every level of the
8 Department and the City, including the City Attorney’s Office, to care about, and not just
9 give lip service to, the importance of good policing and accountability. Failure to address
10 these issues undermines the core objectives of the NSA and will prevent Defendants from
11 coming into substantial compliance.

12 The City’s responses to the Court Investigator’s report make clear that this Court’s
13 August 14, 2014 order and the Investigator’s report have gotten the attention of the Chief
14 of Police, City Attorney, and Mayor. What is less clear is how long that attention will last,
15 or whether the City has plans to institutionalize the reforms that they have already
16 implemented and those that they promise to implement. The Court hopes that the City
17 now recognizes the need for meaningful and sustainable change, but it cannot rely on
18 promises alone. Indeed, the Court has heard many such promises before – including on
19 this very issue more than three years ago – and it is troubling that the joint report from the
20 City Attorney, Chief of Police, and City Administrator, attached as an exhibit to the
21 Investigator’s report, identified multiple reforms that were within the signatories’ powers
22 to implement but that remained mere recommendations rather than actions taken.


23 Accordingly, with good cause appearing, IT IS HEREBY ORDERED that
24 Defendants shall work to eliminate the problems identified by the Court Investigator.
25 They shall consult with the Compliance Director, who may, if necessary, invoke his power
26 to take corrective action, including development of a corrective action plan that includes
27 internal compliance testing. *See* Dec. 12, 2012 Order re: Compliance Director at 6. On or
28 before **September 1, 2015**, Defendants shall file a progress report discussing specific

1 actions they have taken in response to this order and a timeline for any planned actions that
2 have not been fully implemented.

3 The Court reiterates that its expectation is not that the City will prevail at every
4 arbitration. However, as the Investigator's report makes abundantly clear, the City's
5 approach to discipline is not based on the "best available practices and procedures for
6 police management" the City agreed to implement more than twelve years ago. NSA at 1.
7 To the contrary, there are many steps the Department and the City can take to improve the
8 manner in which discipline cases are prepared both internally and for arbitration. It is
9 difficult to imagine how, absent these steps, the goals of accountability and fair and
10 consistent discipline – two of the foundations of the NSA – will ever be achieved.

11
12 **IT IS SO ORDERED.**

13
14 Dated: 04/20/15

15
16
17
18
19
20
21
22
23
24
25
26
27
28


THELTON E. HENDERSON
United States District Judge